Internal Revenue Service
SB/SE, Compliance
BIRSC, SS-8 Unit

Department of the Treasury
40 Lakemont Road
Newport, VT 05855-1555

Date: March 30, 2007

Blackwater Security Consulting LLC
c/o Blackwater Lodge & Training Center
850 Puddin Ridge Rd.
Moyock, NC 27958-8679-504

Form: SS-8

Person to Contact:
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Refer Reply to: Case # 49728

Dear Sir or Madam:

This is in response to a Form SS-8 that was submitted to request a determination of employment status for Federal employment tax purposes, between Blackwater Security Consulting LLC, hereafter referred to as the firm, and [redacted], hereafter referred to as the worker, for services he performed in 2005.

We hold the worker to have been an employee of the firm. In the rest of this letter, we will explain the facts, law, and rationale that form the basis for this finding.

According to the information submitted, the firm is a broker that recruits candidates for the position of security professional pursuant to a very detailed set of standards dictated by the U. S. Government Agency at issue. The firm engaged the worker to perform security services as a Personal Security Specialist. The firm required the worker to personally perform his services for its client at a U.S. installation in Afghanistan. The worker followed instructions regarding his assignment from the firm's client in Afghanistan. The worker worked a specific schedule as determined by the client.

The firm paid the worker's travel expenses such as his taxi, hotel, and air fare. The firm submitted a written agreement between the firm and worker to provide the services. The agreement explained the type of work, work rotation, and that the worker's services were an essential part of the services that the firm offers its clients. The firm performed an evaluation and had the right to suspend the worker for violating its procedures. The firm's client paid the firm for its services and the firm paid the worker a salary for the security services he performed for the client. Both parties could terminate the work relationship without incurring any liabilities.

Section 3121(d)(2) of the Internal Revenue Code provides that the term "employee" means any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of employee.

The question of whether an individual is an independent contractor or an employee is one of fact to be determined upon consideration of the facts and the application of the law and regulations in a particular case. Guides for determining the existence of that status are found in three substantially similar sections of the Treasury Regulations. They are sections 31.3121(d)-1, 31.3306(i)-1, and 31.3401(c)-1 relating to the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and Federal income tax withholding on wages at source, respectively.

Section 31.3121(d)-1(c)(2) of the regulations provides that generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services not only as to the results to be accomplished by the work, but also as to the details and means by which the result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but also as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which services are performed; it is sufficient if he or she has the right to do so. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished and not as to the means and methods for accomplishing the result, he or she is an independent contractor.

In determining whether an individual is an employee or an independent contractor under the common law, all evidence of both control and lack of control or autonomy must be considered. In doing so, one must examine the relationship of the worker and the business. Facts that illustrate whether there is a right to direct or control how the worker performs the specific tasks for which he or she is hired, whether there is a right to direct or control how the financial aspects of the worker's activities are conducted, and how the parties perceive their relationship provide evidence of the degree of control and autonomy.

Section 31.3121(d)-1(a)(3) of the regulations provides that if the relationship of an employer and employee exists, the designation or description of the parties as anything other than that of employer and employee is immaterial. Thus, if an employer-employee relationship exists, any contractual designation of the employee as a partner, coadventurer, agent, or independent contractor must be disregarded.

Therefore, your statement that the worker was an independent contractor pursuant to a written agreement is without merit. For Federal employment tax purposes, it is the actual working relationship that is controlling and not the terms of the contract (oral or written) between the parties.

We have applied the law, regulations, and principles as cited above to the information submitted. As is the case in almost all worker classification cases, some facts point to an employment relationship while other facts indicate independent contractor status. The determination of the worker's status, therefore, rests on the weight given to the factors under the common law, keeping in mind that no one factor is determinative of a

worker's status. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. In weighing the evidence, careful consideration has been given to the factors outlined below.

Under the common law, the relationship of employer and employee exists when the person for whom the services are performed has the right to control not only what is done, but also how it is done. Evidence of control generally falls into three categories: behavioral controls, financial controls, and relationship of the parties, which are collectively referred to as the categories of evidence.

Factors that illustrate whether there is a right to control how a worker performs a task include training and instructions. In this case, you retained the right to change the worker's methods and to direct the worker to the extent necessary to protect your financial investment. You provided the job assignment to the worker and, although your client provided the worker with the details regarding the services, you expected the worker to provide specific security services as required.

A worker who is required to comply with another person's instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the right to require compliance with instructions. Some employees may work without receiving instructions because they are highly proficient and conscientious workers or because the duties are so simple or familiar to them. Furthermore, the instructions that show how to reach the desired results may have been oral and given only once at the beginning of the relationship. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.

Factors that illustrate whether there is a right to direct and control the financial aspects of the worker's activities include significant investment, unreimbursed expenses, the methods of payment, and the opportunity for profit or loss. In this case, the worker did not invest capital or assume business risks, and therefore, did not have the opportunity to realize a profit or incur a loss as a result of his services. You paid the worker's traveling expenses to the location of services and you paid his salary to perform his services.

If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. See Rev. Rul. 55-144, 1955-1 C.B. 483.

Factors that illustrate how the parties perceive their relationship include the intent of the parties as expressed in written contracts; the provision of, or lack of employee benefits; the right of the parties to terminate the relationship; the permanency of the relationship; and whether the services performed are part of the service recipient's regular business activities. In this case, both parties retained the right to terminate the work relationship at any time without incurring a liability. The worker was not engaged in an independent enterprise, but rather the services performed by the worker were essential to your client, as your client was dependent on you providing the necessary people with specific security skills, and a necessary and integral part of your business.

Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

In evaluating the facts in this case, it is clear that the worker performed services in a manner consistent with an employer-employee relationship. Applying the law, regulations, and principles set forth in various revenue rulings and court cases, as well as the categories of evidence outlined above, we conclude that the worker was an employee of the firm for Federal employment tax purposes, and not an independent contractor engaged in his own trade or business.

Compensation to an individual classified as an employee is subject to Federal income tax withholding, Federal Insurance Contributions Act tax (FICA), and Federal Unemployment Tax Act (FUTA) tax as provided by sections 3101, 3301, and 3401 of the Internal Revenue Code, and it is possible you are liable for the same.

Section 530 of the 1978 Revenue Act established a safe haven from an employer's liability for employment taxes arising from an employment relationship. This relief may be available to employers who have misclassified workers if they meet certain criteria. This is explained more fully in the enclosed fact sheet. It is important to note that this office does not have the authority to grant section 530 relief in relation to this determination. Section 530 relief is officially considered and possibly granted by an auditor at the commencement of the examination process should IRS select your return(s) for audit. The SS-8 determination process is not related to an examination of your returns. There is also no procedure available to you by which you can request an audit for the purpose of addressing your eligibility for section 530 relief. You should contact a tax professional if you need assistance with this matter.

If you are not eligible for section 530 relief, section 3509 of the Code provides that if an employer fails to deduct and withhold any tax under chapter 24 (income tax withholding) or subchapter A of Chapter 21 (employee portion of FICA tax) with respect to any employee by reason of treating an employee as not being an employee, the employer's liability is 1.5 percent of the employee's wages plus 20 percent of the **employee's** portion of the FICA tax. The employer's liability is doubled in cases where the employer failed to meet the reporting requirements of sections 6041(a) or 6051 consistent with the treatment of the employees as independent contractors. You must pay the full amount of the **employer's** share of FICA taxes and the full amount of tax under the FUTA.

Section 3509(c) provides that the reduced rates of section 3509 do not apply in cases of an employer's intentional disregard of the requirement to deduct and withhold such tax and do not apply in any period within the current calendar year.

This determination is based on the application of law to the information presented to us and/or discovered by us during the course of our investigation; however, we are not in a position to personally judge the validity of the information submitted.

This ruling pertains only to the work relationship addressed in this letter; however, it may be applicable to any other individuals engaged by the firm under similar circumstances. Section 6110(k)(3) of the Code provides it may not be used or cited as precedent.

You are responsible for satisfying the employment tax reporting, filing, and payment obligations that result from this determination, such as filing employment tax returns or adjusting previously filed employment tax returns. The SS-8 Program does not calculate your balance due and send you a bill. Your immediate handling of this correction and your prompt payment of the tax may reduce any related interest and penalties.

For information regarding your tax liabilities, your eligibility for section 3509 rates, and instructions concerning the filing of your employment tax returns, please see the enclosed Information Guide, "Frequently Asked Questions When IRS Reclassifies Workers as Employees." However, if you deem that your firm meets the criteria for section 530 relief as outlined in the enclosure, you do not have to file your employment tax return to reflect this determination. Also, you may choose to reclassify this class of worker to employee status in accordance with this determination for future periods without jeopardizing your ability to claim section 530 relief for past periods.

If you need further assistance in filing your employment tax returns due to the reclassification of your worker, please call the IRS help line at 1-800-829-4933. Call 1-866-455-7438 for assistance in preparing or correcting Forms W-2, W-3, 1099, 1096, or other information returns.

Internal Revenue Code section 7436 concerns reclassifications of worker status that occur during IRS examinations. As this determination is not related to an IRS audit, it does not constitute a notice of determination under the provisions of section 7436.

Sincerely,

Shiela O'Brien
Operations Manager

Enclosures: Section 530 Fact Sheet
Notice of IRS Compliance Expectations
941/944 Information Guide
Forms: 941 and 941c
2005: 940, 1099-MISC, 1096, W-2, and W-3

*To order forms and publications, please call 1-800-TAX-FORM or visit us online at www.irs.gov.

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